

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN B. WARE,

Defendant-Appellant.

UNPUBLISHED

September 11, 2014

No. 315863

Ingham Circuit Court

LC No. 12-000262-FC

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to life imprisonment without the possibility of parole for the first-degree murder conviction, four to 10 years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. BACKGROUND FACTS

At about 3:30 p.m. on December 20, 2011, Desmond Dorris was shot to death while sitting on a bench at the Capitol Area Transit Authority (CATA) bus station in Lansing. The victim's girlfriend, Mollie Field, who was sitting next to him, screamed that the shooter was "Pac."¹ Video surveillance of the CATA bus station showed that the shooter immediately ran in a westward direction after the shooting, but the surveillance failed to capture the shooter's face or the shooting itself. However, a bus rider, Tedessa Johnson, and a bus driver, Colleen Whalen, each witnessed defendant running away from the scene shortly after the shooting, although neither witnessed the shooting itself.

¹ Trial testimony indicated that "Pac" was a nickname for defendant because he resembles deceased rapper Tupac Shakur.

Field initially failed to identify defendant as the shooter when she was first questioned by the police, allegedly because the victim would not approve of her cooperation with law enforcement if he survived the shooting. But when the interviewing detective informed her that the victim had died, she told the police that defendant shot Dorris. James Brown testified that defendant admitted to him that he had shot and killed Dorris. Over defendant's objection, Johannes Wagemaker testified that about two minutes after the shooting, a bicyclist told defendant that "you killed my ears with that" as defendant walked away from the CATA bus station.²

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence of his identity as the perpetrator of the shooting to convict him of the crimes charged. This Court applies a de novo review to challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We view the evidence in the light most favorable to the prosecution and must determine whether a rational trier of fact could have found that all the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). This Court must afford deference to the jury's special ability to assess the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514–515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The defendant's identity as the perpetrator of the crime must be proven beyond a reasonable doubt. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Here, Field testified that defendant shot the victim. Although she did not see his face, she identified defendant by his distinctive walk and dark green jacket. Johnson testified that she saw defendant running from the scene with a gun in his hand, and Whalen saw defendant running from the scene as well. In addition, Wagemaker testified that he saw defendant west of the CATA bus station a few minutes after the shooting, which was consistent with testimony and video surveillance indicating that the suspect ran west. Further, Brown testified that defendant described to him his role in the homicide. This evidence was sufficient to prove defendant's identity as the shooter beyond a reasonable doubt.

To the extent that defendant challenges the credibility of each witness, such credibility determinations are for the jury and cannot warrant reversal under a claim of insufficient evidence. *Wolfe*, 440 Mich at 514-515. Moreover, defense counsel carefully impeached each witness with his or her previous inconsistent statements, so any credibility issues were fairly presented to the jury. While defendant emphasizes that Field initially failed to identify him as the shooter when she was questioned by the police, it is noted that several witnesses testified that Field repeatedly identified defendant as the shooter in the immediate aftermath.³ Field's immediate identification of defendant at the CATA bus station but not at the police station

² The bicyclist was never identified by the police.

³ While not ruled on by the trial court, Field's statements immediately after the shooting would have qualified as excited utterances. See MRE 803(2).

supports her explanation that she was reluctant to cooperate with the police while the victim was still alive, not that she was uncertain about defendant's identity as the shooter.⁴

In his Standard 4 brief, defendant argues that the government failed to investigate other suspects, so it is possible that he was not the shooter. However, the prosecutor "need not negate every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It was reasonable for the police and the prosecution to focus entirely on defendant given the eyewitness testimony.

Defendant also briefly argues that the pretrial identification process was impermissibly suggestive because Field was acquainted with defendant before the shooting. A pretrial identification procedure violates a defendant's due-process rights when it "was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Here, Field was easily able to view the shooter during the homicide, described a man matching defendant's description to the lead detective, and identified defendant in the second photographic lineup only one day after the shooting with "100 percent" certainty. Each of these facts indicates that there was not a substantial likelihood of misidentification. See *id.* at 306. Moreover, Field's initial failure to conclusively identify defendant in the first photographic lineup did not invalidate her subsequent identifications.

III. HEARSAY

Defendant argues that the trial court erred by admitting the hearsay statement of the bicyclist. We review for an abuse of discretion a trial court's decision whether to admit or exclude evidence. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). "The trial court abuses its discretion when its decision is outside the range of principled outcomes." *Id.*

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless otherwise provided by the rules of evidence. See MRE 802. The statement at issue attributed to the unidentified bicyclist ("you killed my ears with that") was hearsay because it was admitted to prove the truth of the matter asserted, i.e., that defendant affected the bicyclist's hearing in some way, presumably by firing a gun. Under MRE 803(1), a hearsay statement is admissible if it describes or explains "an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE

⁴ Defendant's reliance on *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998) is misplaced because that case discussed the law applicable to granting a new trial, not a claim of insufficient evidence. In any event, our Supreme Court in *Lemmon* held that a new trial is warranted when "testimony contradicts indisputable physical facts or law" or "testimony is patently incredible or . . . inherently implausible." *Id.* at 647. Here, Field's testimony that defendant was the shooter was plausible and consistent.

803(1). “The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be substantially contemporaneous with the event.” *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998) (citation and internal quotation marks omitted). Each condition must be independently corroborated, so a present-sense impression cannot provide its own foundation for admissibility. *Id.* at 237.

The first condition was satisfied. The statement clearly did not “explain” the perceived event, but it was reasonable to conclude that the statement “described” it. The perceived event was the gunshot, and the statement implicitly described (1) the gunshot as loud, and (2) defendant as the cause of the gunshot. The second condition was satisfied because it is at least reasonable to infer that the declarant (the bicyclist) personally perceived the shooting by hearing it, as a bicyclist was seen on the surveillance video traveling in the shooter’s westerly direction after the shooting. Thus, the surveillance video provided the necessary independent corroboration. The third condition was satisfied because the lapse of about two minutes between the shooting and the statement, as established by Wagemaker’s testimony, was substantially contemporaneous. See *Hendrickson*, 459 Mich at 236 (four-minute lapse). Wagemaker’s testimony also provided the necessary independent corroboration. Thus, the trial court did not abuse its discretion by admitting the testimony under MRE 803(1).

IV. DETECTIVE OPINION TESTIMONY

Defendant argues that a detective improperly opined while testifying that defendant was the shooter. In response to a question by the prosecution on re-direct examination, the detective testified that “the shooter fled the scene. Was not arrested until two days after the fact in Detroit.” On re-cross examination, defense counsel asked the detective to clarify that defendant was the “suspect,” not the “shooter.” The detective answered, “I believe he is the shooter.” We review this unpreserved claim of nonconstitutional error for plain error affecting substantial rights, meaning that we will reverse only if a plain error occurred, and the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Even if we were to agree that the detective’s testimony constituted plain error, we find it harmless in light of the overwhelming evidence of defendant’s guilt. The video surveillance showed a person matching defendant’s description acting in a suspicious manner shortly before the shooting and running west of the CATA bus station immediately after the shooting. Two witnesses clearly saw defendant’s face as he ran away from the CATA bus station, and another witness saw defendant west of the CATA bus station a few minutes after the shooting. More importantly, Field was familiar with defendant and identified him as the shooter. Finally, Brown

testified that defendant admitted his role in the homicide. The video surveillance, eyewitness testimony, and confession overwhelmingly established defendant's guilt.⁵

V. VOLUNTARY MANSLAUGHTER INSTRUCTION

Defendant argues that the trial court erred by refusing to instruct the jury on voluntary manslaughter. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

"[W]hen a defendant is charged with murder, an instruction for voluntary . . . manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). "The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

In this case, the evidence does not support a finding that defendant acted in the heat of passion. The evidence revealed that defendant and the victim fought on November 7, 2011. The period between the November 7, 2011, fight and the December 20, 2011, shooting was more than sufficient for a reasonable person to control his or her passions. See *People v Pouncey*, 437 Mich 382, 385, 392; 471 NW2d 346 (1991) (30 seconds constituted adequate "cooling-off period"); *People v Wofford*, 196 Mich App 275, 280; 492 NW2d 747 (1992) (trial court erred in ruling that 24 hours did not constitute "cooling-off period"). Moreover, Brown testified that defendant stated that after the victim was released from jail, he "went down there and took care of business." Defendant's argument that the fight could not be a motive for the murder without also forming the basis for voluntary manslaughter is misplaced. See *People v Gjidoda*, 140 Mich App 294, 298; 364 NW2d 698 (1985). Moreover, when a jury finds a defendant guilty of first-degree murder and rejects a verdict of second-degree murder, failure to instruct the jury on voluntary manslaughter is necessarily harmless error. See *Sullivan*, 231 Mich App at 520. Here, the jury found defendant guilty of first-degree murder and rejected a charge of second-degree murder, so any possible error in failing to instruct the jury on voluntary manslaughter was harmless.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

⁵ Similarly, defendant has failed to establish that, but for his attorney's failure to object to the detective's unresponsive testimony and to request a curative instruction, a different outcome would have resulted. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002).